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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 COSTCO WHOLESALE CORPORATION,

9 Plaintiff,

10 v.

11 ARROWOOD INDEMNITY COMPANY,

12 Defendant.

NO. C17-1212RSL

ORDER DENYING MOTION TO
CERTIFY AN INTERLOCUTORY
APPEAL

13 This matter comes before the Court on defendant's "Motion for Certification of
14 Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and Request for a Stay of Proceeding
15 Pending Appeal." Dkt. # 130. Defendant requests leave to immediately appeal the Court's
16 determination that, for exhaustion purposes, an excess insurer is generally bound by the
17 underlying insurers' decisions to pay "Loss" under their policies. Dkt. # 126 at 9-13. Pursuant to
18 28 U.S.C. § 1292(b):
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20 When a district judge, in making in a civil action an order not otherwise appealable
21 under this section, shall be of the opinion that such order involves a controlling
22 question of law as to which there is substantial ground for difference of opinion
23 and that an immediate appeal from the order may materially advance the ultimate
24 termination of the litigation, he shall so state in writing in such order. The Court of
25 Appeals which would have jurisdiction of an appeal of such action may thereupon,
26 in its discretion, permit an appeal to be taken from such order, if application is
made to it within ten days after the entry of the order: *Provided, however, That*

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28 ORDER DENYING MOTION TO CERTIFY
AN INTERLOCUTORY APPEAL - 1

1 application for an appeal hereunder shall not stay proceedings in the district court
2 unless the district judge or the Court of Appeals or a judge thereof shall so order.


3 “[T]he legislative history of 1292(b) indicates that this section was to be used only in
4 exceptional situations in which allowing an interlocutory appeal would avoid protracted and
5 expensive litigation.” In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir.1982)).
6 While the appeal need not have a final, dispositive effect on all issues raised in the litigation, the
7 district court must be of the opinion that it would “materially advance the ultimate termination of
8 the litigation.” Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681 (9th Cir. 2011).

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10 That is not the case here. First, the record before the Court does not support a finding
11 regarding the amount of the alleged overpayments. Without that information, it is impossible to
12 conclude that the resolution of this dispute would materially impact the outcome or judgment in
13 this case. Second, the dispute is not substantial. The only authority that supports Arrowood’s
14 interpretation of the policy language is found in unpublished decisions from Minnesota.¹
15 Washington’s rules for interpreting insurance policies, as well as the majority of the relevant
16 case law and treatises, lead to the conclusion that, for exhaustion purposes, an excess insurer is
17 bound by the underlying insurers’ determination that a particular invoice falls within the
18 coverage provision of the policy and should be paid. Finally, interlocutory review of a single
19 issue related to Costco’s contract claim will not materially advance the ultimate termination of
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24 ¹ Arrowood’s citation to Allmerica Fin. Corp. v. Certain Underwriters at Lloyd’s, 871 N.E.2d
25 418, 428-29 (Mass. 2007), is unpersuasive. Allmerica stands for the proposition, accepted by the
26 undersigned at Dkt. # 126 at 9-10, that excess insurers are free to make their own coverage and
27 settlement decisions. It does not, however, support the proposition that the excess insurer can seek to
28 undo or invalidate the coverage decisions of the underlying insurers in order to argue that the underlying
limits were not, or should not have been, exhausted.

1 the litigation and all but guarantees multiple appeals. This is not the type of exceptional case in
2 which an interlocutory appeal will conserve resources or promote judicial economy. The request
3 for certification under § 1292(b) is therefore DENIED.
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6 Dated this 29th day of May, 2019.

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8 Robert S. Lasnik
United States District Judge
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